No. 8092.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of
WILLIAM DILLER,
Bankrupt.

William Diller,
Appellant.

vs.

Michael Shoemaker, John Hancock Mutual Life Insurance Company, a corporation, and California Trust Company, a corporation,
Appellees.

APPELLANT'S OPENING BRIEF.

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I.
FACTS.

The facts involved in this appeal are embodied in an "AGREED STATEMENT OF CASE." [Tr. pp. 6-22.]

Condensed for the sake of brevity and chronologically outlined as near as possible, the facts follow:

1. September 14, 1934, appellant, alleging he was a farmer, filed his petition under section 75, subsections (a) to (r), of the Bankruptcy Act as amended.

2. Thereafter, as required by section 75 (a) to (r) of the Bankruptcy Act, appellant submitted an offer for composition which was rejected by his creditors.

3. On March 4, 1935, the Conciliation Commissioner under section 75 (a) to (r) proceedings filed his certificate that the composition had failed and recommended that appellant be adjudged a bankrupt under section 75, subsection (s), of the Bankruptcy Act as then existing.

4. On the same day, March 4, 1935, appellant filed his amended petition to be adjudged a bankrupt under section 75 (s) of the Bankruptcy Act; the order of adjudication followed.

5. Proceedings under section 75 (s) of the Bankruptcy Act were immediately referred to D. W. Richards, Referee in Bankruptcy for San Bernardino county.

6. From March 5, 1935, through May 27, 1935, when the Supreme Court declared section 75 (s) of the Bankruptcy Act as then existing unconstitutional, proceedings were had before Referee Richards under the old section 75 (s) of the Bankruptcy Act.

7. Immediately following the Supreme Court's action, that is on June 3, 1935, the appellee Shoemaker, holder of a delinquent trust deed on a farm in San Bernardino county, which farm was included as one of appellant's assets in his schedules, moved to dismiss the bankruptcy proceedings before the Referee because of the invalidity of section 75 (s) of the Bankruptcy Act; the motion was granted.

8. Then on June 24, 1935, appellant Diller filed an amended petition praying:

(a) To dismiss the proceedings in so far as they were affected by section 75 (s) of the Bankruptcy Act, which had just been declared unconstitutional; and

(b) For an extension of time to attempt a second offer for composition with creditors under the subsections (a) to (r) of section 75 (s).

A ninety-day extension to September 22, 1935, was granted.

9. Meanwhile, on August 28, 1935, Congress passed new amendments to section 75 (s) of the Bankruptcy Act; it is the interpretation of this amended section 75 (s) of the Bankruptcy Act which is now the subject of this appeal.

10. So on September 19, 1935, having again failed to effect a composition under section 75 (s) of the Bankruptcy Act, appellant filed an amended petition to be adjudged a bankrupt under section 75 (s) of the Bankruptcy Act as newly amended by Congress on August 28, 1935. Adjudication under the new act was ordered.

11. At the time of his original petition filed September 14, 1934, appellant owned, among other properties, two pieces of realty:

(a) One parcel was a ranch consisting of approximately 265 acres located in San Bernardino county, California, which property was subject to a trust deed held by appellee Shoemaker securing a promissory note upon which principal was unpaid and delinquent in the sum of $48,000; interest was also due to the extent of $6,000; 9/10ths of the taxes for 1931-32 was unpaid; the trust deed was in existence prior to said September 14, 1934.

The trust deed was in the usual form and gave the creditor the usual rights under a California trust deed, as appears more in detail in the Transcript of Record, pages 11 and 12.

(b) The other property was a house and lot located in the city of Los Angeles, California. The property was subject to a trust deed held by appellee John Hancock Mutual Life Insurance Company in the principal sum of $20,000, and securing a promissory note. As of November 25, 1935, there was delinquent, besides the principal, interest and taxes in the sum of $7,434.06, besides taxes for the year 1934-1935. This trust deed is likewise in the customary California form and the terms are more particularly set out in the transcript of record, pages 14 and 15.

12. Appellant's proposal for composition with creditors, made on September 18, 1935, under the procedure outlined by section 75 (a) to (r) of the Bankruptcy Act, and made before appellant filed his petition under section 75 (s) as amended of the Bankruptcy Act, offered to pay the sum of $46,550.00 in satisfaction of the promissory note and trust deed held by appellee Shoemaker, and offered to pay the sum of $21,610.00 in satisfaction of the promissory note and trust deed held by appellee John Hancock Mutual Life Insurance Company, each of said sums having been the value placed upon the respective properties by appraisers appointed in the earlier proceedings.

13. On July 24, 1935, appellee Shoemaker, and on July 25, 1935, appellee John Hancock Mutual Life Insurance Company, each respectively filed petitions for leave to foreclose under their respective trust deeds. [Tr. pp. 17-18.]

14. Hearing on these two motions was held September 5, 1935. The motions were denied without prejudice to renew them after an expiration of thirty days.

15. But on September 21, 1935, appellant Diller was adjudicated a bankrupt under section 75 (s) as amended of the Bankruptcy Act.

16. On November 19, 1935, both appellee Shoemaker and appellee Hancock Company renewed their motions for leave to foreclose under their trust deeds, and further to dismiss the proceedings under section 75 (s) as amended of the Bankruptcy Act, but now on the additional ground that this new amended section was also unconstitutional.

17. On November 25, 1935, a hearing on these motions was had before the District Court. Evidence was had and received as is more fully set out in the Transcript, page 20.

18. On December 13, 1935, the District Court, relying solely upon the issue of constitutionality, ruled that section 75 (s) as amended of the Bankruptcy Act was unconstitutional. [Tr. p. 23 *et seq.*]

19. On January 4, 1936, based upon this opinion, a formal judgment of dismissal was filed dismissing the proceedings under section 75 (s) as amended, as well as under section 75 (a) to (r) of the Bankruptcy Act, and expressly permitting appellees to pursue their remedies under their respective deeds of trust. [Tr. pp. 33 to 34.]

20. Subsequent to the taking of this appeal, appellee John Hancock Mutual Life Insurance Company and appellee Shoemaker have each foreclosed under their respective trust deeds, and thereafter each has filed a suit for deficiency judgment in the state court, which suits are now pending.

II.

SPECIFICATION OF ERRORS RELIED UPON.

Appellant relies upon the following specifications of errors:

1. The court erred in holding that the existing subsection (s) of section 75 of the Bankruptcy Act deprives secured creditors of the above named bankrupt, and more particularly Michael Shoemaker, John Hancock Mutual Life Insurance Company, a corporation, and California Trust Company, a corporation, of substantive rights without compensation, in violation of the Constitution of the United States of America, and is therefore invalid.

2. The court erred in holding that said subsection (s) deprives holders of deeds of trust upon real property of said bankrupt, and more particularly the said Michael Shoemaker, John Hancock Mutual Life Insurance Company and California Trust Company, of the right to determine when a sale of such property shall be held after default made by the bankrupt in the payment of obligations secured by said deeds of trust, subject to the discretion of the court; and the court erred in holding that such right is postponed for three years or for a shorter time at the pleasure of the debtor and not the holder of such deeds of trust.

3. The court erred in holding that said subsection (s) deprives holders of deeds of trust upon real property of said bankrupt, and more particularly the said Michael Shoemaker, John Hancock Mutual Life Insurance Com-

pany and California Trust Company, of the right, pending such sale and during the period of such default, subject only to the discretion of the court, to have the rents and profits from such real property collected by a receiver for the satisfaction of said obligations, and to control said property.

4. The court erred in holding that the period of redemption allowed by said subsection (s), after the sale of real property of the bankrupt at public auction at the request of a creditor holding a deed of trust thereon, deprives the holder of such deed of trust of a property right.

5. The court erred in ordering the dismissal of the within bankruptcy proceeding.

III.
THE ISSUES.

From this statement of the facts, it is clear that the record presents only two issues:

(A) At the time when the District Court dismissed the bankruptcy proceedings solely upon the ruling that Section 75 (s) as amended of the Bankruptcy Act was unconstitutional, had the proceedings reached that legally requisite stage where the constitutionality of the legislation was open to attack?

(B) Was the District Court right in holding that Section 75 (s) as amended of the Bankruptcy Act is unconstitutional?

IV.
ARGUMENT.

(A) The Issue of Constitutionality of Section 75 (s) as Amended of the Bankruptcy Act was Prematurely Raised, There Being No Showing Before the District Court at That Time That the Property Rights of Appellees Had Been Injured by the Operation of the Act.

The act, among other things, provides that when the farmer-debtor's attempts at a composition with his creditors have failed under section 75 (a) to (r), then an amended petition may be filed by the debtor for adjudication of the bankrupt under section 75 (s) as amended of the Bankruptcy Act. The act then states [Title 11, U. S. Code Annotated, Sec. 203, Subsec. (s)]:

> "* * * Such farmer may, at the same time, or at the time of the first hearing, petition the court that all of his property, wherever located, whether pledged, encumbered, or unencumbered, be appraised, and that his unencumbered exemptions and unencumbered interest or equity in his exemptions, as prescribed by State law, be set aside to him, and that he be allowed to retain possession, under the supervision and control of the court, of any part or parcel or all of the remainder of his property, including his unencumbered exemptions, under the terms and conditions set forth in this section. Upon such a request being made, the referee, under the jurisdiction of the court, shall designate and appoint appraisers, as provided for in this title. Such appraisers shall appraise all of the property of the debtor, wherever located, at its then fair and reasonable market value. The appraisals shall be made in all other respects with rights of objections, exceptions, and

appeals, in accordance with this title: *Provided,* that in proceedings under this section, either party may file objections, exceptions, and take appeals within four months from the date that the referee approves the appraisal.

(1) After the value of the debtor's property shall have been fixed by the appraisal herein provided, the referee shall issue an order setting aside to such debtor his unencumbered exemptions, and his unencumbered interest or equity in his exemptions, as prescribed by the State law, and shall further order that the possession, under the supervision and control of the court, of any part or parcel or all of the remainder of the debtor's property shall remain in the debtor, as herein provided for, subject to all existing mortgages, liens, pledges, or encumbrances. All such existing mortgages, liens, pledges or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors, as their interests may appear."

Only after these preliminary steps have been taken and complied with may the court "stay all judicial proceedings in any court, or under the direction of any official, against the debtor or any of his property, for a period of three years." (Title 11, U. S. Code Annotated, section 203, subsection 3, paragraph 2; section 75 (s) as amended of the Bankruptcy Act.)

Obviously, the mere institution of proceedings under the act did not prejudice the creditors. As far as the record shows nothing would ever have been done under the new proceedings taken under the amended Frazier-

Lemke Act. The record speaks of appraisal values having been placed upon the properties of appellees, but these appraisal proceedings had apparently been taken under procedure outlined in section 75 (a) to (r). [Tr. pp. 16, 17.]

The record does not indicate that the prerequisite steps outlined in section 75 (s) of the Bankruptcy Act had been taken which would have entitled the court to stay all foreclosure proceedings for three years. Nor does it follow that the three-year stay would automatically have been granted. If the debtor had been unable to show his ability to pay a reasonable rental to be fixed by the court, the stay would not have been granted. The immediate point is *that the court had at no time made any such order.* At the time, therefore, when the court dismissed the proceedings of appellant no injury to the property rights of appellees had been done; there was no order preventing them from proceeding with their rights as secured creditors under the trust deeds. Whether the court would have subsequently stayed proceedings does not appear, and conjecture on this point can be no basis for voiding statutory proceedings on alleged grounds of unconstitutionality.

Under this state of facts the well-established doctrine of law is controlling, namely: *A law shall not be declared unconstitutional unless it affirmatively appears that at the time the question is raised the carrying out of the allegedly invalid act would immediately prejudice the suitor's right to person or property.*

See:

Dallas Joint Stock Land Bank v. Davis, 83 Fed. (2d) 322, at 323 (C. C. A. 5, May 5, 1936).

In this case the farmer had started to proceed under the amended Frazier-Lemke Act.

"The District Judge thought the act as amended did not take, but safeguarded, appellant's substantial rights as a secured creditor. He found, on sufficient evidence, that at that stage of the proceedings there was no such showing of inability to finance the debt with the assets involved as would justify the court in refusing to take jurisdiction. He ordered the case referred to a special conciliation commissioner for statutory proceedings. It was at this juncture and from this order that this appeal was taken.

"The record before us stops at this point. We do not know, there is no showing, whether appellees could or did comply with the provisions of the act to obtain, there is no order granting, the statutory stay. The only order here for review is the one refusing to dismiss the application, and referring it for statutory proceedings. On the record we have, the only effect of this order on appellant at this time is to prevent the collection of its debt through the state court proceedings, by requiring its collection through the bankruptcy court. Though the attack is predicated upon the claim that the necessary effect of the order under the act will be to deprive appellant of substantial property rights, no evidence is offered to show this. The appeal is here on the broad claim that on its face, and as a necessary result of its

operation, the invoked section takes away substantial rights of appellant in its security, and within the Radford Case is unconstitutional and void.

"This claim raises a preliminary question of prime importance whether, at this stage of the proceedings, when nothing has been done but to take jurisdiction, appellant's constitutional attack is premature. It is urged that an inquiry will not be conducted into a complainant's constitutional rights until there has been a substantial invasion of them, and that nothing of that kind has occurred here. It is insisted that while the act as amended does direct the granting of a stay of collection for a maximum period of three years, this stay is not granted as of right absolutely and at all events, but only upon conditions, the prime one of which is the exercise of judicial discretion whether the stay may be granted with a due regard for the substantial rights of creditors in their securities.

"It may not be doubted that if the necessary result of the act is to take away appellant's substantial rights in its security, it need not wait until all the forms prescribed for that taking away have been gone through with, but may sue at once to save itself. * * * It is equally without doubt, however, that the action is premature, and that no constitutional question is presented for decision if the pinch of the act will be felt by appellant not as a necessary, but only as a possible, result of its application. For it is a settled rule in the federal courts that questions of constitutional law will not be anticipated, but will be decided only where a present necessity for such decision exists, and then only no more broadly than the precise situation in question requires. * * *"

See also:

United States National Bank of Omaha v. Pamp, 77 Fed. (2d) 9 (C. C. A. 8, April 23, 1935).

Here the original Frazier-Lemke Act was attacked as unconstitutional and the court refused to pass upon that issue because the proceedings under the act had not reached that stage where the unconstitutionality should with propriety be passed upon.

> "It is argued that this provision is unconstitutional because the lienholder is deprived of his property without due process of law, contrary to the provisions of the Fifth Amendment. Undoubtedly, as said by the Supreme Court in Continental Illinois National Bank & Trust Company v. C. R. I. & P. Ry. Co., *supra,* the power of Congress has limitations, but 'those limitations have never been explicitly defined,' and we do not think it necessary to the determination of this case to pass upon the validity of subdivision (s). As yet nothing has been done to appellants' security; except to stay proceedings. It is quite possible that an offer of composition may be made which will be as acceptable to appellants as continued ownership of the mortgage or ownership of the real estate. In other words, the provisions of this subdivision may never be invoked. The unconstitutionality of this subdivision would not necessarily invalidate the other provisions of the act, and ordinarily a litigant can be heard to question a statute's constitutionality only when and so far as it is being or is about to be applied to his disadvantage. * * *"

See also to the same effect:

In re Paul, 13 Fed. Supp. 645, at 647 (District Court of Iowa, February 8, 1936).

It is earnestly submitted that upon this recognized ground alone the decree of the District Court should be reversed and the cause remanded for further proceedings.

If we are correct in this, a consideration of the constitutionality of section 75 (s) as amended of the Bankruptcy Act is entirely unnecessary. However, for the sake of completeness we have included a discussion respecting the constitutionality of this statute.

(B) The New Frazier-Lemke Act Is Constitutional.

Since Charles Evans Hughes, before becoming Chief Justice, pithily remarked that "the Constitution is what the Supreme Court says it is," we might be forgiven if we simply urged this Honorable Court to sustain the constitutionality of the amended Frazier-Lemke Act solely upon the basis of the presumption of constitutionality of any act not absolutely unconstitutional on its face, leaving to the Supreme Court to take upon itself the onus of deciding the ultimate constitutionality of the Act.

We feel, however, that the moral weight of a ruling by this distinguished court holding the act valid is well worth the burden of going forward with proof of constitutionality. We likewise feel that in the interim before final ruling by the Supreme Court, a decision of this Honorable Court upholding the act would do much to stabilize conflicting views now prevalent throughout the circuit, both on the bench and at the bar.

(1) Analysis of the Original Subsection (s) of Section 75 of the Bankruptcy Act Declared Unconstitutional by the Supreme Court.

The scheme of the original subsection (s) was that upon a failure to effect a composition or extension the debtor could file an amended petition asking to be adjudged a bankrupt. His property was then appraised "at its then fair and reasonable value, not necessarily the market value, at the time of such appraisal." It was then provided that after exemptions had been set aside to the debtor he should remain in possession, under the control of the court, of any part or parcel or all of the remainder of his property, subject to a general lien as security for the payment of the value thereof to the creditors, which general lien was to be inferior to all existing liens, the latter remaining in full force and effect. Upon request of the debtor and with the consent of the lienholders, it was provided that the trustee "shall agree to sell to the debtor any part, parcel, or all of the remainder of the bankrupt estate at the appraised value upon installments spread over a long period of years." Upon payment of the appraised price in installments, the debtor was to receive a clear and unencumbered title to such property as he elected to buy. If he failed to complete the purchase price or to comply with the orders of the court, the secured creditors were permitted to enforce their security in accordance with law. But they were compelled, upon payment of the appraised value of all or any part of the debtor's property, to discharge all liens of record on such property. If the debtor complied with all orders of the court and paid the appraised value, he was entitled to his discharge.

If, however, any secured creditor filed written objections to the scheme of payment, then the court was em-

powered to stay all proceedings for a period of five years, during which time the debtor remained in possession of all or any part of his property under control of the court, provided he paid a reasonable rental annually for that portion of the property of which he retained possession. At the end of the five-year period, or prior thereto, the debtor might pay into court the appraised price of the property of which he retained possession, subject to a re-appraisal, in which event he might pay the reappraised price if acceptable to the lienholders. But, if the re-appraised price was not acceptable to the lienholders, he paid the original appraisal price and thereupon the court turned over full possession and title of such property as the debtor paid for to the debtor and he might apply for his discharge. If, during the five year period the debtor failed to comply with the orders of the court, the payment of rental, etc., his estate was to be liquidated through the ordinary channels of bankruptcy. It was expressly provided that all the terms and provisions of subsection (s) should apply only to debts existing at the time the subsection became effective.

(2) Analysis of the Case of Louisville Joint Stock Land Bank v. Radford.

This is the case in which the Supreme Court of the United States declared subsection (s) of section 75 of the National Bankruptcy Act unconstitutional in an opinion delivered by Mr. Justice Brandeis. (79 L. Ed. 920.) In this case Radford made a mortgage of 170 acres of land, presumably of the appraised value of at least $18,000.00, to the Louisville Joint Stock Land Bank to secure loans aggregating $9,000.00, to be paid in installments over the period of 34 years, with interest at the

rate of six per cent. Radford's wife joined in the mortgages and the notes. The Radfords made default in their covenant to pay taxes, in their promise to pay installments of interest and principal, and in their covenant to keep the building insured. The bank declared the entire indebtedness immediately due and payable and commenced suit in the state court to foreclose the mortgages and for the appointment of a receiver to take possession and control of the premises and to collect the rents and profits. The application for the appointment of a receiver was denied and all proceedings were stayed upon request of the Conciliation Commissioner appointed under section 75 of the Bankruptcy Act, as he stated that Radford desired to avail himself of the provisions of that section.

Under subsection (a) to (r) of section 75, Radford filed in the federal court a petition for composition, which was approved, and the first meeting of creditors was held. Composition failed and finally the state court entered a judgment ordering a foreclosure sale.

Meanwhile, the Frazier-Lemke Act had been passed on June 28, 1934, and Radford filed an amended petition for relief thereunder. Answering the petition the bank claimed the Frazier-Lemke Act was unconstitutional and that Radford's amended petition should be dismissed and the bank permitted to pursue its remedies in the state court. The bank's objections were overruled and the referee ordered an appraisal. The appraisers found that the fair and reasonable value of the mortgaged property, and also the market value of the same, was $4,445.00. The bank refused to consent to a sale of the mortgaged property to Radford at the appraised value and filed written objections thereto and thereupon the referee or-

dered that for the period of five years all proceedings for the enforcement of the mortgage should be stayed and that the possession of the mortgaged property, subject to liens, should remain in Radford under the control of the court at a fixed rental, and the case arose upon review of his orders.

It was contended by the bank, first, that if the Act was applied solely to mortgages created after it became effective, it was not a proper exercise of the bankruptcy power, and second, that if the act was applied to pre-existing mortgages, it violated the Fifth Amendment to the Constitution of the United States in that it deprived the bank of its property without due process of law and without just compensation.

In the first part of his opinion (we feel it not necessary to discuss this in detail here), Justice Brandeis clearly recognized that it was possible without violating any constitutional amendment to grant by legislation a valid stay to the mortgagor. The court intimated very strongly that if the Frazier-Lemke Act had been drawn along the lines of the Minnesota Moratorium Act, which was held constitution in *Home Building & Loan Assn. v. Blaisdell,* (290 U. S. 398, 78 L. Ed. 413), the act might have been constitutional. In the Minnesota Act, the statute left the period of extension of the right of redemption to be determined by the court within the maximum limit of two years and even after the period had been decided upon, it could be reduced by order of the court under the statute in case of a change in circumstances.

(3) Analysis of the New Subsection (s) Shows That It Substantially Meets the Requirements of the Radford Case.

We turn now to a consideration of the new Frazier-Lemke Act. The scheme of the new subsection (s) resembles in some respects the old subsection (s) but very material changes have been made in the new act.

There is the same provision for amendment of the original petition filed under subsections (a) to (r) of section 75 and adjudication as a bankrupt and appraisal of the property. The principal change, as far as appraisal is concerned, is that under the new Act property is to be appraised at its fair and reasonable market value instead of its fair and reasonable value, not necessarily market value, as provided in the old act.

Perhaps the most significant change is the complete elimination of the plan of purchase by the bankrupt on installments over a long period of years at a totally inadequate rate of interest. This is the plan which was so severely condemned by Mr. Justice Brandeis in the *Radford* case. Under the old act, although the plan was conditional upon the assent of the mortgagee, nevertheless if he failed to assent to the plan, the farm debtor could retain possession of the property under control of the court for the period of five years. The point the court had in mind was undoubtedly that a consent obtained under such circumstances was in reality no consent at all. This feature, however, of the old act has been entirely eliminated from the new.

The new act provides merely for what is in effect a moratorium. The rights and remedies of the mortgagee remain unimpaired but their operation is suspended during

the period of the moratorium. The provision of the new Act is that after the value of the debtor's property has been fixed by appraisal, the referee shall issue an order setting aside exemptions and shall further order that the possession under the supervision and control of the court of any part or all of the remainder of the debtor's property shall remain in the debtor subject to all existing liens, which are to remain in full force and effect. It then provides that when the conditions set forth in the Act have been complied with, the court shall stay all proceedings for a period of three years. The debtor remains in possession during the period, subject to the control and supervision of the court provided he pays a reasonable rental semi-annually for that part of the property of which he retains possession. The amount and kind of such rental is to be the usual customary rental in the community where the property is located, based upon the rental value, net income and earning capacity of the property. It is to be paid into court and used first for the payment of taxes and upkeep of the property and the remainder is to be distributed among secured and unsecured creditors and applied on their claims as their interests may appear. The court also may, in addition to the rental, require payments on account of principal to be made quarterly, semi-annually or annually, consistently with the protection of the rights of the creditors and the debtor's ability to pay with a view to his financial rehabilitation.

At any time during the three year period the debtor may pay into court the amount of the appraised value of the property which he retains, less the amount he may previously have paid on principal, provided, however, that any creditor may demand a reappraisal, in which event

the debtor pays the reappraised price and provided, further, that upon request in writing by any secured creditor the court shall order the property upon which such secured creditors have a lien to be sold at public auction.

It can therefore be seen at a glance that all that the new Act has accomplished is to grant to the debtor a moratorium or breathing space for a maximum period of three years. But it is quite significant that the last section of the Act provides for a shortening of the time in the event that the court finds the emergency which necessitated the Act no longer exists and may then proceed to liquidate the estate. This provision brings the Act into harmony with the Minnesota moratorium statute, which was held constitutional in the *Blaisdell* case, *supra*.

Mr. Justice Brandeis enumerated in the *Radford* case the rights which the mortgagee had until he was deprived of them by the enactment of the old subsection (s). It is therefore pertinent to examine these rights and see to what, if any, extent they have been impaired by the new subsection (s):

(a) The first of these rights is "the right to retain the lien until the indebtedness thereby secured is paid." This right has not been impaired in any degree whatever. The Act specifically provides that the debtor's possession is subject to all existing mortgages, liens, pledges or encumbrances, and that all such existing mortgages, liens, pledges or encumbrances shall remain in full force and

effect and the property covered by such mortgages, liens, pledges or encumbrances shall be subject to the payment of the claims of the secured creditors as their interests may appear. [Section 1 of subsection (s).]

(b) The second right is "the right to realize upon the security by a judicial public sale." In contradistinction to the old act, the new one specifically preserves this right for although the right rests in abeyance during the period of the moratorium, yet it is always there. If the debtor, during the period of the moratorium, pays into court the appraised price, the secured creditor is not bound to accept it but can, upon written request, demand a sale at public auction. If the debtor fails at any time to comply with the provisions of the Act or with the orders of the court or is unable to refinance himself within three years, the court may order the appointment of a trustee and order the property sold through the usual bankruptcy channels. [Section 3 of subsection (s).]

It is obvious that under such circumstances the secured creditor has the right to realize on his security by an immediate public judicial sale. The same thing is true if the moratorium is shortened by a finding that the emergency which justified it has ceased to exist. [Section 6 of subsection (s).]

(c) The third right is "the right to determine when such sale shall be held, subject only to the discretion of the court." This right must necessarily be impaired because the impairment of the right is of the essence of all

moratorium legislation. Whether such impairment is unconstitutional is the real question in the case and will be discussed at a later point in this brief.

(d) The fourth right is "the right of the secured creditor to protect its interest in the property by bidding at such sale whenever held and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt either through receipt of the proceeds of a fair competitive sale or by taking the property itself." It cannot for a moment be contended that this right has been impaired. The new Act specifically gives to the creditor the right to demand a public sale at auction. The Act does not forbid the creditor to bid at his own sale and there is nothing in the Act to suggest that such a right has been or is intended to be abridged. The preservation of this right is one of the fundamental differences between the old and the new legislation. This right was destroyed completely by the old legislation and its destruction was one of the features most severely condemned by Mr. Justice Brandeis.

(e) The last right is "to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt." It must be admitted that this right has to some extent been impaired, but here again, as in the case of the right to determine when the sale shall be had, impairment is implicit in all moratoriums.

(4) A Moratorium for a Maximum Period of Three Years Does Not Violate the Fifth Amendment or Deprive the Secured Creditor of His Property Without Due Process of Law.

Mr. Justice Brandeis, in the Radford case, *supra,* suggested very pointedly that if the original subsection (s) provided merely for a moratorium, as did the Minnesota Act in the Blaisdell case, *supra,* it would have been constitutional. He condemned the original legislation because it provided a method of giving to the debtor his property free and clear of the mortgage without satisfying the obligation. The present legislation attempts no such thing and merely suspends the secured creditor's rights and remedies during the period of the moratorium.

The Minnesota moratorium was, as has been said, held constitutional in the *Blaisdell* case, the doctrine of which was reaffirmed by Mr. Justice Brandeis in the *Radford* case. It is true that in the *Blaisdell* case there was no question of conflict with the Fifth Amendment because that amendment restricts only the legislative power of Congress and not of the several states The Fourteenth Amendment, however, restricts the legislative power of the states in substantially the same fashion as the Fifth restricts that of Congress. If, therefore, the Fourteenth Amendment was not violated by the Minnesota moratorium, it must follow that the Fifth Amendment is not violated by the new subsection (s). It is true that the source of power in the two cases is entirely different. When the legislature of Minnesota passed the moratorium act it was exercising the police power reserved to it by the Federal Constitution. When Congress passed the new subsection (s) it was exercising the bankruptcy

power expressly granted to it by the Federal Constitution. However, as we have said before, it was conceded, if not decided in the *Radford* case, that even the legislation under attack in that case was within the bankruptcy power. Assuming, therefore, that the power exists in both state and national legislatures to adopt moratorium legislation, the only remaining question is whether there has been any violation of the Fourteenth or Fifth Amendments by the respective legislatures. Consequently, the moratorium legislation of Minnesota declared to be constitutional in the *Blaisdell* case is a convenient yardstick for measuring the constitutionality of the new subsection.

The Minnesota statute was explained by Mr. Chief Justice Hughes in his opinion in the *Blaisdell* case as follows:

> "We approach the questions thus presented upon the assumption made below, as required by the law of the state, that the mortgage contained a valid power of sale to be exercised in case of default; that this power was validly exercised; that under the law then applicable, the period of redemption from the sale was one year and that it has been extended by the judgment of the court over the opposition of the mortgagee purchaser; and that during the period thus extended, and unless the order for extension is modified, the mortgagee purchaser will be unable to obtain possession, or to obtain or convey title in fee, as he would have been able to do had the statute not been enacted. *The statute does not impair the integrity of the mortgage indebtedness. The obligation for interest remains. The statute does not affect the validity of the sale or the right of a mortgagee purchaser to title in fee. or his right to obtain a deficiency judgment, if the mortgagor fails to redeem*

within the prescribed period. Aside from the extension of time, the other conditions of redemption are unaltered. While the mortgagor remains in possession he must pay the rental value as that value has been determined, upon notice and hearing, by the court. The rental value so paid is devoted to the carrying of the property by the application of the required payments to taxes, insurance and interest on the mortgage indebtedness. While the mortgagee purchaser is debarred from actual possession, he has, so far as rental value is concerned, the equivalent of possession during the extended period." (290 U. S. pp. 442-425; 78 L. Ed. 421-422; Italics ours.)

The principal distinction between the Minnesota statute, as described by Mr. Chief Justice Hughes, and the new subsection (s) is that the Minnesota statute permitted a sale, but, by extending the period of redemption, left the mortgagor in possession, whereas subsection (s) restrains all proceedings including the sale and leaves the mortgagor in possession during the period of the moratorium. Another distinction is that the Minnesota statute provided for an extension of the period of redemption for two years, whereas subsection (s) provides for a moratorium of a maximum of three years. These are not vital distinctions. In the one case the mortgagee is permitted to have a sale which gives him neither title nor possession during the extended period of redemption; in the other he is not permitted to have a sale and is deprived of title and possession during a maximum period of three years. What difference is there between permitting a sale which realizes nothing from the security for a period of two years and preventing realization upon the security for a period of three years? The parallelism between the Min-

nesota moratorium and subsection (s) is perfect. The only real distinction is the difference betwen two and three years. Will the highest court of our land, after having sustained the constitutional validity of the one act which in effect provides for a two year moratorium, strike down subsection (s) merely because it provides for an additional year? Does constitutionality lie in the difference between two years and three years?

(5) The Better Reasoned Cases Uphold the Constitutionality of the New Frazier-Lemke Act.

The decisions which have had occasion to pass upon the constitutionality of the Frazier-Lemke Act are fairly evenly divided.

Appellees will, of course, refer to those cases holding the new subsection (s) of section 75 of the Bankruptcy Act invalid.

In passing, however, two observations in connection with these cases to be cited by appellees should be made:

(1) In practically each of these cases, actual steps had already been taken by the creditors to enforce their property rights under their securities.

(2) All of these anti-Frazier-Lemke Act cases admit that the new amendment effectively preserves three of the five property rights of the creditor discussed in the *Radford* case, namely:

1. The right to retain the lien until the indebtedness thereby secured is paid.

2. The right to realize upon the security by judicial sale.

4. The right to protect its interest in the security by bidding at such sale whenever held.

These cases insist that the amendment is invalid because two of the property rights spoken of in the *Radford* case are still inadequately protected, namely:

(3) The right to determine when such sale shall be held subject only to the discretion of the court; and

(5) The right to control meanwhile the property during the period of default and to have the rents and profits collected by a receiver for the satisfaction of the debt.

The following cases which hold the new Frazier-Lemke Act to be constitutional should be carefully examined:

Dallas Joint Stock Land Bank v. Davis, 83 Fed. (2nd) 322 (C. C. A. 5);

In re Slaughter, 12 Fed. Supp. 296, District Court, Northern District, Texas;

In re Reichert, 13 Fed. Supp. 1, District Court, Western District, Kentucky;

In re Cole, 13 Fed. Supp. 283, District Court, Southern District, Ohio;

In re Bennett, 13 Fed Supp. 353, District Court, Western District, Missouri.

In the *Dallas Joint Stock Land Bank* case, *supra,* the Circuit Court of Appeals for the Fifth Circuit said, among other things:

> "In approving the amendment, the judiciary committees of both House and Senate agreed that its object and purpose was the clarification of section 75 and the addition of a new subsection (s) in place of the subsection (s) held unconstitutional. Both com-

mittees in recommending the bill for passage declared that the new subsection had been written so as to conform to the decision of the Supreme Court and that they felt that it did conform. We think it not a strained construction to hold that it does.

"On its face the act merely transfers the liquidation of the indebtedness from state courts to the court of bankruptcy. It remits to the judicial discretion of that court the administration of the property of a bankrupt, with the end in view to bring about, if a due regard for the property rights and interests of his creditors permits it, a gradual and therefore more just and equitable liquidation, in lieu of an unduly hasty and forced one. Subsection (s) of the act as amended does indeed authorize a stay of collection for a maximum period of three years, during which time the debtor may remain in possession, but the stay so granted is not an absolute one. It is one granted and continued in the judicial discretion of the court if, and only if, this may be done without deprivation of or injury to, and upon conditions looking to the preservation of, the creditor's security. Under its provisions the court must fix, and require the debtor to pay, a reasonable rental on the property, to be applied upon the debt. Under its provisions, the court may, and if in the exercise of a sound discretion and protection and preservation of the security demand it, must require additional payments on the principal sum due and owing. Under its provisions. the court may, upon a finding that the preservation of the security requires it, revoke the stay order and direct the sale of the property.

"These provisions of the act make it clear, we think, that the act grants no absolute stay, permits no arbitrary or unjust interference with creditors.

It merely remits all questions regarding the collection of the debt to an informed judicial discretion, a discretion which, keeping the preservation of the security paramount, may yet, if circumstances permit, afford a means of relief to the debtor. They make it clear that the controlling, the dominant purpose and effect of the act as amended is not to deprive creditors of their security to give it to debtors, but to remit to judicial discretion in each case, whether the facts justify giving the debtor an equitable opportunity in an orderly way, to liquidate his indebtedness, provided always that the essential security of the creditor is not impaired, but preserved. A law on the subject of bankruptcy having this purpose and effect is not, in our judgment, violative of the Fifth Amendment. The authority of Congress to make uniform laws on the subject of bankruptcy is a broad one. It extends to and authorizes not merely ordinary bankruptcy laws, as they were understood and in existence at the time of the adoption of the Constitution, but insolvency laws in general. It extends to and authorizes all just laws, having for their object the liquidation of indebtedness. It lawfully embraces in its scope and purpose not only the just protection of the creditor, but the relief of the debtor. * * * Under its bankruptcy powers Congress lawfully provides for the complete abrogation of the personal obligation of debts, the discharge of the debtor. Under these powers Congress lawfully provides for the making of compositions; under them it lawfully marshals the properties of debtors and provides for their equitable distribution among the secured creditors, to the extent even of authorizing a complete rearrangement and rewriting of the obligations. Authorities, *supra*. Under these powers it

may, we think, make just provision for the exercise of judicial discretion in granting reasonable stays of liquidations in bankruptcy.

"We think the act on its face is within the bankruptcy powers of Congress; that nothing in the record we have shows that the necessary result of its application to appellant will deprive it of its property; that appellant is at this stage of the proceeding in no position to raise a constitutional question; and that the order appealed from should be affirmed. The affirmance, however, is without prejudice to the right of appellant to apply at any further stage of the proceeding, for relief from actions or orders which it is advised have the effect of depriving it of any substantial rights."

In the *Reichert* case, *supra,* the court carefully compares the new Frazier-Lemke Act with the invalidated old act and finds no difficulty in holding the amended act constitutional.

"The Supreme Court in the Radford Case decided that article 1, §8 of the Constitution, authorizing the Congress to establish uniform laws on the subject of bankruptcies, was restricted by the Fifth Amendment, and that the following property rights were conferred under the laws of Kentucky:

'(1) The right to retain the lien until the indebtedness thereby secured is paid.

'(2) The right to realize upon the security by a judicial public sale.

'(3) The right to determine when such sale shall be held, subject only to the discretion of the court.

'(4) The right to protect its interest in the property by bidding at such sale, whenever held, and thus

to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the proceeds of a fair competitive sale or by taking the property itself.

'(5) The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt.'

"The court held that the act invaded these rights and was, therefore, void.

"Under the amendment, the farmer must have proceeded unsuccessfully under section 75 (a to r) of the old act (47 Stat. 1470) before invoking the provisions of subsection (s) of the amended act 11 U. S. C. A. §203 (s); that is to say, he must have failed to procure the assent of a majority in number and amount of the claims against him to composition or an extension proposal, or 'feel aggrieved' by such a proposal which has been accepted. When these facts are shown, the farmer may then file his petition under the amended act, subsection (s), asking that he be adjudged a bankrupt and allowed the benefits of this subsection.

"All of the property of the debtor is then appraised at its reasonable, fair market value, with the right in either debtor or creditor to file exceptions to the value thus determined within four months from the date of the approval of the appraisal by the referee. After the value of the debtor's property has been determined by appraisal, the referee is to set aside to the farmer his 'unencumbered exemptions,' and all of the remainder of the property of the debtor is to remain in his possession under the supervision and control of the court, 'subject to all existing mortgages, liens, pledges or encumbrances.'

"After these things are done, if the court concludes the proceedings are in good faith and it is made to reasonably appear that a debt liquidation may be effected, the court may direct a stay of all proceedings against the debtor or his property for a period of three years, conditioned on the farmer paying semiannually a reasonable rental to be fixed by the court for such of his property as he retains in his possession. The rental to be paid as defined in the act is 'the usual customary rental in the community where the property is located, based upon the rental value, net income, and earning capacity of the property,' [11 U. S. C. A. §203 (s) (2)] and when paid shall first be applied by the court upon taxes and upkeep of the property; the remainder, if any, to be paid to lien creditors and unsecured creditors as their interest may appear. The first rental payment is not due until one year from the date of the order of the court staying proceedings, and thereafter shall be paid every six months.

"In addition to rental payments, the court, in its discretion, may require quarterly, semiannual, or annual payments on the principal, 'not inconsistent with the protection of the rights of the creditors and the debtor's ability to pay, with a view to his financial rehabilitation.' 11 U. S. C. A. §203 (s) (2). The court may also, in its discretion, order sold at public or private sale any nonexempt personal property which is (a) perishable, or (b) not reasonably necessary for the farming operations of the debtor, if the court concludes such a sale necessary to protect the creditors from loss or to conserve the security.

"At the end of the 3 years' extension period, or at any time prior thereto, the farm debtor may purchase the property retained in his possession free and clear

of claims of his creditors by paying into court the amount of the appraised value of the property, credited by any amount which has theretofore been paid on the principal. This right to purchase is subject to the following limitations:

"(1) Any creditor, or the debtor himself, may demand a reappraisal of the property at the date of the proposed purchase, in which event new appraisers are to be appointed by the court, or the court may hear evidence and fix the value of the property. The debtor is then required, before obtaining the property, to pay the value thereof as determined either by the new appraisement or the value as fixed by the court.

"(2) Any secured creditor, upon written request to the court, may demand that the property upon which he has a lien be sold at public auction, and if sold the debtor is accorded the right to redeem the property at any time within 90 days after the sale by the payment of the sale price, together with 5 per cent. interest thereon. After full compliance with the provisions of the act and all orders issued by the court in the course of the proceedings, the farmer is granted a discharge.

"If he fails to comply with any order of the court pursuant to the provisions of the act or is unable to refinance himself within 3 years, the court may appoint a trustee and order the property sold or otherwise disposed of as provided under the original Bankruptcy Act.

* * * * * * * * *

"Under the amended act, the exclusive right of the debtor to purchase the mortgaged property at its appraised value is taken away. The mortgagee can

require a public sale to the highest and best bidder, and of course has the right to protect himself by bidding at the sale. His lien is preserved until the pledged property has been sold and the proceeds used to discharge the lien debt. The amended act, when fairly construed, conditionally extends the period of sale to enforce the lien 3 years, with 90 days added as a period of redemption to the debtor. Within the 3-year period, the debtor, if he retains the possession of the property, must pay the fair rental value thereof, and in addition thereto may be required to make payments on the principal; the latter, however, not to be inconsistent with the protection of the rights of the creditors and the debtor's ability to pay with a view to his financial rehabilitation.

* * * * * * * * *

"It follows that the court is not authorized to grant the 3-year extension unless it is made to reasonably appear that the lien creditor will not suffer any substantial loss in the value of his security by reason of the delay. The original purpose of Acts of Bankruptcy was to bring about a prompt, equal disposition of the debtor's property among his creditors, and to relieve the debtor of obligations and responsibilities following a business misfortune, and to permit him to start afresh. However with the change in the condition of the relationship of debtors and creditors, the scope of original acts has been extended to persons, properties, and different debtor contracts.

* * * * * * * * *

"Section 77 of the Bankruptcy Act (see 11 U. S. C. A. §205), providing for railroad reorganization, invades the rights of creditors to a much greater extent than does the act here in question. The Supreme Court sustained that act in Continental Illi-

nois Nat. Bank & Trust Co. v. Chicago, Rock Island & P. Ry. Co., 294 U. S. 648, 55 S. Ct. 595, 79 L. Ed. 1110, and section 77B (see 11 U. S. C. A. §207), providing for corporate reorganization, invades the rights of creditors more drastically than the act here. That section has been sustained as constitutional.

* * * * * * * * *

"It may be said that the long period of recognized equity receiverships applicable to both railroads and corporations which postponed the payment of debts of such corporations distinguishes sections 77 and 77B from the act here in question, but when we are dealing with the exercise of the constitutional power, it would seem that if the Congress can confer on the bankruptcy courts the power theretofore exercised by courts of equity corporate receiverships, a fortiori it may constitutionally confer on bankruptcy courts for farmers the same power as conferred for corporations.

"The act under consideration is not in its terms essentially different from the Minnesota Moratorium Law (Laws 1933, c. 339), which was sustained by the Supreme Court in the case of Home Building & Loan Association v. Blaisdell, 290 U. S. 398, 54 S. Ct. 231, 78 L. Ed. 413, 88 A. L. R. 1481. The Minnesota act may be said to have been sustained as a valid exercise of the police power of the state, justified by an emergency, and that Congress has no such power; but in answer to this, the Congress may exercise its constitutional powers for any purpose for which a state may exercise its powers.

* * * * * * * * *

"In Continental Illinois Nat. Bank & Trust Co. v. Chicago, Rock Island & P. Ry. Co., *supra*, the court said: 'The fundamental and radically progressive

nature of these extensions becomes apparent upon their mere statement; but all have been judicially approved or accepted as falling within the power conferred by the bankruptcy clause of the Constitution. Taken altogether, they demonstrate in a very striking way the capacity of the bankruptcy clause to meet new conditions as they have been disclosed as a result of the tremendous growth of business and development of human activities from 1800 to the present day. And these acts, far-reaching though they be, have not gone beyond the limit of congressional power; but rather have constituted extension into a field whose boundaries may not yet be fully revealed."

One of the most cogently reasoned District Court decisions is *In re Bennett, supra.* We quote pertinent extracts:

"The original Frazier-Lemke Act (48 Stat. 1289) was held unconstitutional by the Supreme Court. * * * In the enactment of the statute now considered (the second so-called Frazier-Lemke Act), the Congress conscientiously and sincerely endeavored to obviate the defects pointed out in the original act by the Supreme Court. The most cursory reading of the new act reveals in every one of its provisions this highly commendable intent. I am not prepared to say that Congress did not succeed in accomplishing that purpose.

"The original act was held unconstitutional for that it deprived secured creditors of property without due process of law in violation of the Fifth Amendment. The chief question, therefore, to be considered in connection with the present act is this: Does this act deprive secured creditors of property without due process of law? Another question also has been

argued and must be decided: If the new act does not deprive secured creditors of property without due process of law, is it otherwise invalid as not within the power of Congress to enact laws upon the subject of bankruptcies? All that I can say upon that question, however, I said in the case of *in re* Jones (D. C.) 10 F. Supp. 165. I do not consider there is anything in the opinion in the Radford case which throws doubt upon the conclusion stated in that connection in the Jones case. The broad power of Congress concerning bankruptcies is sufficient to uphold the present act, provided it does not contravene the due process clause of the Fifth Amendment.

"The draftsman of the new act wrote the act with the opinion of the Supreme Court in the Radford case in his hand. It was pointed out in that opinion that the former act deprived the secured creditor of five separate property rights, to wit: '(1) The right to retain the lien until the indebtedness thereby secured is paid. (2) The right to realize upon the security by a judicial public sale. (3) The right to determine when such sale shall be held, subject only to the discretion of the court. (4) The right to protect its interest in the property by bidding at such sale whenever held. * * * (5) The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt.' But it would be a superficial view of the opinion in the Radford case which would lead to the conclusion that the former act was held unconstitutional simply because it took away from the secured creditor one or more of these property rights. If that were the correct view, then the present act, of course, must be held unconstitutional, for it undoubtedly does take from

the secured creditor (1) the right to determine when the debtor's real estate shall be sold under mortgage or deed of trust and (2) the right to control the property during the period of default.

"The taking from the secured creditor of any of the five property rights set out by the Supreme Court was held by that court to be a violation of the due process clause of the Fifth Amendment only if thereby the security of the creditor was substantially impaired. I do not consider that it can be said beyond a reasonable doubt that the present act does substantially impair the creditor's security.

"The draftsman of the new act wrote the act not only with the opinion of the Supreme Court in the Radford case before him, but with the opinion of that court in Home Building & Loan Assn. v. Blaisdell, 290 U. S. 398, 54 S. Ct. 231, 78 L. Ed. 413, 88 A. L. R. 1481, also in his hand. In the latter of these opinions the Supreme Court upheld a statute enacted by the Legislature of Minnesota granting a moratorium for a maximum period two years to owners of mortgaged real estate in the state upon condition that during the extended time for payment 'the reasonable rental value of the property involved' (should be used) 'in or toward the payment of taxes, insurance, interest, mortgage or judgment indebtedness' (and so applied) 'at such times and in such manner as shall be fixed and determined and ordered by the court.' The right of the mortgagee to possess upon the expiration of the moratorium provided in the act was preserved.

"The validity of the Minnesota act was attacked on two grounds: First, on the ground that it impaired the obligations of contracts; second, on the ground that it took the property of the mortgagee

without due process of law. The Supreme Court upheld the act, notwithstanding both these provisions of the Constitution. Here, of course, we are not concerned with the constitutional provision prohibiting states impairing obligations of contracts.

"The due process clause of the Fifth Amendment is identical in its meaning with the due process clause in the Fourteenth Amendment which was considered in the Blaisdell case. If the Minnesota act upheld in that case is good as against the due process clause of the Fourteenth Amendment, the act here under consideration, if essentially it does no more than the Minnesota act, is good as against the due process clause of the Fifth Amendment.

"I do not consider that there is any vital distinction between the Minnesota act and the act here considered. The purpose of each is to effect a moratorium for persons indebted where the debts are secured by mortgages or deeds of trust.

"The Minnesota act effects a maximum moratorium of two years. The act here effects a maximum moratorium of three years. While an unlimited moratorium or a moratorium for an extended period undoubtedly would be invalid, it is hardly to be believed that the difference between two years and three is great enough to invalidate an act providing for a three-year moratorium which would be valid if the moratorium was for two years only.

"Both the Minnesota act and the act here provide that during the moratorium the secured creditor shall receive reasonable rental from the property. Both the Minnesota act and the act here authorize the court having jurisdiction to shorten the period of the moratorium. Both the Minnesota act and the act here provide for the ultimate realization by the mortgagee of the full value of the property covered by the mort-

> gage, to the full amount of the debts and accrued interest thereon. The differences between the acts are not substantial, and it cannot be said that, if the first does not violate the due process clause; the second does."

As indicated earlier in this discussion, practically all of the cases holding the new Frazier-Lemke Act unconstitutional do so on the ground that all five of the property rights of the creditor spoken of in the *Radford* case have not been adequately met.

It is earnestly submitted that this reasoning erroneously presupposes that the *Radford* case laid down *each* of these five property rights as a *sine qua non* for constitutionality. There is nothing in the opinion of Justice Brandeis which would command this view. Rather it is nearer the truth to conclude that the old Frazier-Lemke Act was violative of the Constitution *because so many of the rights of the secured creditors were ignored.*

It is more than probable that it was not intended in the *Radford* case to state a categorical list of rights with which Congress may not interfere. The cumulative effect of a disregard of *all* the rights referred to was to render the statute unreasonable and arbitrary and thereby violative of due process. As stated by Mr. Justice Cardozo in *Worthen v. Kavanaugh,* 295 U. S. 56, at 62 (1934):

> "Whether one or more of the changes effected by these statutes would be reasonable and valid if separated from the others, there is no occasion to consider. A different situation is presented when extensions are so piled up as to make the remedy a mere shadow."

See comments on the new Frazier-Lemke Act in 30 Ill. Law Review 794 and 21 Cornell Law Quarterly 171.

(6) The Presumption of Constitutionality Is Strengthened by the Fact That Congress Made a Sincere and Studied Effort to Meet the Objections Raised by the Radford Decision.

It is admitted on all sides that the original Frazier-Lemke Act was hurriedly passed and slovenly drafted.

It is equally clear that the new amended Frazier-Lemke Act is the result of sincere deliberation, carefully drafted and approved only after being made thoroughly acceptable to the ablest constitutional lawyers of both the Senate and the House. The Senate Committee on the Judiciary made an exhaustive and careful analysis of the new Frazier-Lemke Act and was satisfied that it meets the requirements of the *Radford* case.

In part the report says:

> "In other words, in the amended subsection (s), the property is virtually in the complete custody and control of the court, for all purposes of liquidation. We feel confident that this meets all the requirements of the Supreme Court's decision. In fact, there is nothing new in this amendment that the Supreme Court has not already approved, not only in one decision but in many decisions, in bankruptcy cases.
>
> "The Supreme Court admits, in its decision in the *Radford case,* holding subsection (s) unconstitutional, that it is a law on the subject of bankruptcy, but also holds that it contravenes the fifth amendment. Under the grant of power given by the Federal Constitution, 'Congress shall have power * * * to establish * * * uniform laws on the subject of bankruptcies throughout the United States,' the legislation here in question is legislation on the subject of bankruptcy. The only farmer who can take advantage of this act must be a bankrupt. A bankrupt is a financial wreck. The question of interest and

profits in bankruptcy proceedings is never considered. The question is one of salvaging, and saving what can be saved out of the wreck. In legislating on this subject it is just as much the duty of Congress to consider the unfortunate debtor as to consider the unfortunate creditors.

"This decision of the Circuit Court of Appeals was just recently confirmed by the Supreme Court, *in re Chicago, Rock Island & Pacific Ry. Co.* (293 U. S. 550, 55 S. Ct. 595, 79 L. Ed. 195, 27 Am. B. R. (N. S.) 715).

"It is not unconstitutional for a court of bankruptcy to take jurisdiction of encumbered, as well as unencumbered property, and sell same free and clear of any lien. In fact, a provision to that effect appeared in the Bankruptcy Act of 1867, and has been practiced in many cases under the present Bankruptcy Act.

"Neither is it unconstitutional to sell the property, and transfer the lien to the funds. That, again, has been done repeatedly by courts of bankruptcy.

"Nor is it unconstitutional to limit or prohibit the mortgagee from bidding at an auction sale. In fact, the mortgagee is generally prohibited from bidding at his own sale, unless that right is given to him by statute or by contract.

"All that the mortgagee or lienholder ever was, or is, entitled to in this country is the value of the property, as judicially determined, and there are many methods by which this may be determined. Subsection (s) employs them all, and leaves it in the discretion of the court.

"The time allowed in which to close up the bankrupt's estate in the amended subsection (s) is not unreasonable, and compares very favorably with the time required in bankruptcy and receivership cases

generally. The average of all cases heretofore has been approximately 2 years, and some cases have run as long as 12 years.

"Nor does this act establish a new principle by permitting the bankrupt to remain in possession of his own property, and pay the value as judicially determined for it. That has been determined by the Supreme Court in a number of cases. See the following cases: *Sparhauck v. Yerkes* (142 U. S. 1, 14); *In re Swofford Bros. Dry Goods Co.* (180 Fed. 549); *Burlimgham v. Crouse* (228 U. S. 459); *In re Reiman* (7 Ben. 455, 11 N. B. R. 21, 20 Fed. Cas. 11673, and 12 Blatch. 562, 13 N. B. R. 128, 20 Fed. Cas. 11675.)"

For a full report see Prentice-Hall Bankruptcy Service, Vol. 1, page 324 *et seq.,* Note 14.

See also 21 Cornell Law Quarterly, page 171 at 176 (December, 1935).

The constitutionality of this Act, because of the fate of its predecessor, was the paramount consideration during its progress through Congress. The consensus of Congressional opinion seems to be that the rights of the creditor have been fully protected. It is true that the mere stay of proceedings may appear a temporary loss but Congress has probably acted within its generally recognized power of determining public policy when it decides that because of the existing emergency such a loss would be less than that to be suffered from immediate action. It is difficult to predict with certainty the constitutionality of any legislation but a study of the bill, the discussions in Congress and the opinion in the *Radford* case inclines one to agree with Senator McCarran's remarks after reporting the bill for the Senate Judiciary Committee when he says:

"If any bill can be enacted which will be constitutional it will be a bill along these particular lines."

See 79 Cong. Rec., Aug. 21, 1935, at 14370, where Rep. Martin says: "The Senate debate, which I have read, indicates that it is the opinion of the ablest constitutional lawyers in that body that the bill is in its present form constitutional." *Report of Senate Judiciary Committee, Id.* Aug. 16, at 13961, "Subsection (s) employs them (methods of protecting creditor) all and leaves it in discretion of the court." Senator Logan, *Id.* Aug. 19, at 14102, "I agree that it (the new bill) contravenes no policy of the constitution." Senator Borah, *Id.* Aug. 19, at 14110, "* * * In my opinion, this bill is constitutional." This statement is especially significant when it is recalled that the speaker opposed the first bill on the grounds that it was unconstitutional. Rep. Lemke, *Id.* Aug. 23, at 14627, "All this bill does is to comply with the decision of the Supreme Court, giving the farmer an opportunity to get a breathing spell after he goes into bankruptcy." The bill passed the Senate on Aug. 19, 1935, without a dissenting vote after considerable debate as to its constitutionality.

See 79 Cong. Rec. July 29, 1935, at 12487: The Judiciary Committee of the Senate, composed of Messrs. Ashurst (Ch.) King, Neely, Long, Van Nuys, McCarran, Logan, Dietrich, McGill, Hatch, Burke, Borah, Norris, Hastings, Schall and Austin, including some of the most able lawyers in the upper house on constitutional questions, was unanimously in favor of the bill.

The presumption of constitutionality should in the light of this background not be treated as a mere shadowy formula devoid of meaning, but rather as a genuine doctrine of constitutional interpretation virtually controlling.

V.

CONCLUSION AND SUMMARY.

The judgment should be reversed because:

(1) The issue of constitutionality of section 75 (s) as amended (the new Frazier-Lemke Act) was prematurely raised and passed upon by the District Court, there being no showing that any property rights of appellees had as yet been injured or destroyed by the operation of the Act.

(2) The new Frazier-Lemke Act is constitutional because:

(a) It was passed by Congress only after a thorough study of the Radford decision and with a sincere effort to meet the requirements of that case.

(b) The new Frazier-Lemke Act cuts no deeper into creditors' rights than do other laws dealing with debtor-creditor relations which have been declared valid.

(c) The new Frazier-Lemke Act is reasonable and sets up a procedure *under direct court control* intended to fairly and equitably safeguard the creditors' rights and at the same time effect the financial rehabilitation of the debtor if feasible.

Respectfully submitted,

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